NO. 87-1222

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In the Supreme Court of the United States

OCTOBER TERM, 1987

ALTON J. HOUSTON,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ADOLPH J. LEVY
518 South Rampart Street
New Orleans, Louisiana 70113
(504) 586-9707
Attorney for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

52p

QUESTIONS PRESENTED

1. Did the district court have jurisdiction over the plaintiff's claim when a Federal Drivers Act lawsuit was filed within one year of the plaintiff's accident in state court, when an administrative claim was timely filed and when the United States was not prejudiced by the state court filing?

2. Based upon Mathews v. Diaz, 426 U.S. 67 (1976), when a lawsuit is premature because it was filed before the plaintiff exhausted his administrative remedies, may that prematurity be cured by a supplemental petition?

3. Did the district court err in its assessment of damages of only $25,000 for pain and suffering and total damages of $121,887.20 when there was no testimony contrary to that of the witnesses who testified that the plaintiff had a com-

plete change of personality after his accident?

[Note: Petitioner reserves the right to argue Question 3 in the event certiorari is granted, but does not include Question 3 among the reasons for the grant of certiorari.]

LIST OF PARTIES

The parties to the proceedings are the petitioner, Alton J. Houston and respondent, United States of America.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Plaintiff, Alton J. Houston, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on August 13, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 823 F.2d 896, and is reprinted in the appendix hereto, p. A-1.

The denial of the petitions for rehearing and rehearing en banc by the Court of Appeals for the Fifth Circuit is reported at 830 F.2d 1126, and is reprinted in the appendix hereto, p. A-22.

The memorandum decision of the United States District Court for the Eastern District of Louisiana (Sear, D.J.) has not been reported. It is reprinted in the

App., p. A-23.

The amended judgment of the United States District Court for the Eastern District of Louisiana has not been reported. It is reprinted in the Appendix, p. A-45.

The order of the district court denying the motion of the United States for failure to prosecute has not been reported. It is reprinted in the Appendix, p. A-46.

The minute entry denying the motion for summary judgment filed by the United States has not been reported. It is reprinted in the Appendix, p. A-47.

JURISDICTION

This is a case involving a Federal Drivers Act claim, 28 U.S.C. § 2679, and a claim under the Federal Tort Claims Act. The date of the entry of judgment of the court of appeals was August 13, 1987. A timely application for rehearing was

filed. The application for rehearing was denied on September 23, 1987. Jurisdiction of this court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations are involved:

28 U.S.C. § 1346. United States as defendant

28 U.S.C. § 2401(b). Time for commencing action against United States

28 U.S.C. § 2675(a). Disposition by federal agency as prerequisite; evidence

28 U.S.C. § 2679. Exclusiveness of remedy

28 C.F.R. § 15.3(a). Removal and defense of suits

The text of the foregoing are set forth in the Appendix, pp. A-60, et seq.

STATEMENT OF THE CASE

Plaintiff, Alton J. Houston, was injured when a United States Postal Service vehicle hit a part of the parked

Sewerage and Water Board vehicle in which he was seated. The accident occurred on January 27, 1976. On that very day, an investigation was made by a Postal Service representative and a series of photographs were taken by him while the vehicles were still on the scene. A New Orleans police officer arrived within 20 minutes of the accident and performed a complete accident investigation while the vehicles were still on the scene.

Both the Federal Drivers Act, 28 U.S.C. § 2697(b)-(e) and the Federal Tort Claims Act, codified in pertinent part at 28 U.S.C. §§ 1346(b), 1402(b), 2401 and 2671-2680, applied in this case because the accident involved a federal vehicle.

On January 27, 1977, plaintiff filed suit in state court against the United States Postal Service, the United States of America and the driver, Joseph Howard.

On January 17, 1978, an administra-

tive claim was filed with the United States Postal Service. That claim was denied on April 26, 1978. Plaintiff, on April 21, 1980, amended his state court petition to show that the United States had denied the administrative claim. Service of the suit was made on the United States and the United States Postal Service in April 1980.

The plaintiff did not not attempt to delay the service of process. Rather, the delay in service was due to the failure of law office personnel to properly diary the case when the denial of the claim arrived. Nevertheless, as is reflected below, the United States was not prejudiced because of the delay. Further, because the case involves the Federal Drivers Act, the filing in state court was sufficient to constitute timely action.

The United States removed the state court suit to federal court. It filed a

motion to dismiss and urged that neither federal court nor state court had jurisdiction. The federal district court, in a lengthy opinion, found that it had jurisdiction of the Federal Drivers Act case based upon the following:

1. The state district court had jurisdiction over the claim against Joseph Howard, the federal driver. App., p. A-49.

2. The state district court had jurisdiction over that claim pursuant to the Federal Drivers Act, 28 U.S.C. § 2697(b)-(e). Id.

3. Upon removal, the United States is substituted for the driver and the proceeding is deemed one against the United States under the Federal Tort Claims Act. Id.

4. If the Federal Drivers Act applied, the federal district court had jurisdiction over the United States for a claim originally asserted against its driver in state court. Id., 49-50.

5. The Federal Drivers Act applied. (See No. 2 above.)

6. Filing suit in state court tolled the statute of limitations for the Federal Drivers Act. App., pp. A-54-55.

When it denied the motion to dismiss of the United States, the district court invited the United States to file a motion to dismiss for failure to prosecute. One factor in determining whether the failure to prosecute motion would be granted was whether the government had been prejudiced by any time delays. The government filed that motion to dismiss. Nowhere in that motion did the United States argue that it was in any way prejudiced by any delays. Plaintiff filed an opposition to the motion. The court denied the government's motion to dismiss for failure to prosecute.

The United States has never alleged that it has been prejudiced in any way because of plaintiff's failure to serve the state court suit. It is apparent that there was no prejudice, because there was both a police investigation on the day of the accident and a Postal Service investi-

gation complete with the Service's photographs which were taken virtually immediately after the accident. Indeed, both the Postal Service driver and the policeman who investigated the accident testified at trial. Photographs which had been taken at the scene were also admitted into evidence. Thus, the United States was not prejudiced by reason of any delay.

After a three-day trial, the government again filed a Motion to Dismiss for Lack of Jurisdiction. The district court again found that there was jurisdiction and that the action was brought within the time limitations of the Federal Tort Claims Act. App., p. A-24.

Judgment was rendered in favor of plaintiff for $25,000 general damages and special damages of $96,887.20, for a total of $121,887.20, all with interest.

The government filed a motion to amend the judgment to delete the award of

interest. Plaintiff had no objection to the motion and an amended judgment was signed. App., p. A-45. The government appealed the amended judgment and plaintiff cross-appealed as to the damages awarded.

The Court of Appeals panel reversed the opinion of Judge Sear. App., p. A-1. Petitions for rehearing and rehearing en banc were denied. App., p. A-22.

REASONS FOR GRANTING THE WRIT

I. THE FILING OF A SUIT AGAINST A FEDERAL DRIVER IN STATE COURT IS SUFFICIENT, ON REMOVAL, TO GRANT FEDERAL JURISDICTION OVER A CLAIM AGAINST THE UNITED STATES. THE HOLDING OF THE FIFTH CIRCUIT TO THE CONTRARY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

This case involves a special type of claim -- it is one against a federal driver. For that reason, the Federal Drivers Act applies.[1] Cases have held that when timely suits have been filed

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[1] 28 U.S.C. § 2679(b)-(e).

against federal drivers in state courts, federal courts have jurisdiction of those cases under the Federal Tort Claims Act. The only distinction which would arise in this case is that the suit was filed prior to and not subsequent to the denial of the administrative claim.

Indeed, cases from other circuits have held that the filing of a suit in state court against a federal driver was valid -- even when no administrative claim had been filed. One such case is Staple v. United States, 740 F.2d 766 (9th Cir. 1984). The court of appeal stated the issues before it, those issues being virtually identical to those before this court:

> "Lillian Staple filed this tort suit in state court against an individual employee of the federal government. The Attorney General removed it to federal court and substituted the United States as defendant pursuant to the Federal Drivers Act, 28 U.S.C. § 2679(b)-(e) ('Drivers Act'). We must first decide whether the action was

> properly dismissed in federal court on the ground that Staple filed it in state court before exhausting her federal administrative remedy. We must then determine whether the suit is time-barred because removal occurred after the statute of limitations for actions against the United States had run. We answer both questions in favor of federal jurisdiction and reverse." Id. at 767.

The court "decline[d] to extend the exhaustion requirements of section 2675(a) [the six-month suit requirement of the Federal Tort Claims Act] to state court suits against an individual." Id. at 768. In addition, the two-year claim requirement of the Federal Tort Claims Act was held to have been met by the filing of the suit in state court. As the court stated:

> "The court [in McGowan v. Williams, 623 F.2d 1239 (7th Cir. 1980)] concluded that the original date of filing should be effective under both state and federal law. Id. at 1242. We agree. The place of filing may be state court for the purpose of applying section 2401(b) to the certification and removal procedure of the Drivers Act." Id. at 769-770.

In addition to Staple, at least six other cases have also held that a suit against a federal driver in state court was sufficient to give the federal court jurisdiction over the removed action:

Henderson v. United States, 429 F.2d 588 (10th Cir. 1970) (suit filed in state court deemed sufficient).

Kelley v. United States, 568 F.2d 259 (2d Cir. 1978), cert. denied, 439 U.S. 829, 99 S.Ct. 106, 58 L.Ed.2d 123 (1978) (suit filed in state court without exhausting administrative remedies was sufficient).

McGowan v. Williams, 623 F.2d 1239, 1242-43 (7th Cir. 1980) (reversing dismissal of a claim because the state suit against the individual, filed after the administrative denial, met the FTCA's requirements even though the case was not removed to federal court until after the limitations period expired).

Miller v. United States, 741 F.2d 148,150 (7th Cir. 1984) (reversing the dismissal of a claim arising from a collision with a USPS vehicle. The state court suit against the individual was filed and removed to federal court within six months of the administrative denial, thus timely making the United States a proper party).

Robinson v. United States, 408 F.Supp. 132,135 (N.D.Ill. 1976) (suit filed in state court before denial of administrative claim).

Whistler v. United States, 252 F.Supp. 913 (N.D.Ind. 1966) (suit filed in state court without exhausting administrative remedies deemed sufficient).

See also Reynaud v. United States, 259 F.Supp. 945 (W.D.Mo. 1966) (dictum) (suit in state court deemed sufficient).

The reason for permitting the state court suit to be sufficient in Federal Drivers Act cases was discussed extensively in Whistler:

"While federal tort claim litigation is now barred from the state courts, there is no indication that Congress intended by this legislation to make the federal tort claim statute of limitations a bar to all state actions not removed within the two-year period. There is good reason why Congress did not require this. A plaintiff has no control over such removal. There is no sure way that a plaintiff can know his action is an appropriate federal tort claim until the Attorney General certifies that the employee was acting within the scope of his employment at the time of the incident which gave rise to the claim. There is no good reason

why a plaintiff should trust the United States to concede that element of its own liability on any case that is filed in a federal court. If the employee was not acting within the scope of his employment at the crucial time, the plaintiff has a right of action against the individual employee and has a right to bring that action in the state court and demand a jury trial if he so desires. At the time a suit is filed, the issue of employment cannot yet have been determined. If a suit is filed in federal court and it later is determined that the employee was not acting within the scope of his employment, the suit may be dismissed for lack of jurisdiction. The plaintiff may then be without a remedy if the statute has run in the state court. All this may occur although the plaintiff has a good case against the individual employee and has initiated an action within two years." (Emphasis added.) 252 F.Supp. at 916.

In Staple, Kelley and Robinson the state court suit, as here, was filed before the administrative claim was denied. In Whistler, no administrative claim was even filed.

The foregoing cases are important here because in this case plaintiff did

file a timely administrative claim and the government was given the ability to administratively settle the claim. Thus, the purpose of the 1966 amendments to the Federal Tort Claims Act were met. See Opinion of Fifth Circuit, App., pp. A-7-8. If a state suit where no administrative claim had been filed was valid, then certainly a state suit in which an administrative claim had been filed should, under Mathews v. Diaz, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976) be able to be amended to show that the administrative claim had been filed.[2]

The court stated that its interpretation was "consistent with the majority of cases discussing the FTCA in its post-1966 era." App., p. A-9. However, all of the cited cases involved situations in which

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[2] Mathews is extensively discussed in pp. 22, et seq., infra.

the plaintiff had bypassed the administrative claim procedure. Those cited cases are as follows:

> Henderson v. United States, 785 F.2d 121, 123 (4th Cir. 1986) (dismissing a claim arising from collision with USPS vehicle for failure to file administrative claim within section 2401(b) limitations period).
>
> Rogers v. United States, 675 F.2d 123, 124 (6th Cir. 1982) (same).
>
> Bialowas v. United States, 443 F.2d 1047, 1049 (3d Cir. 1971) (same).
>
> Meeker v. United States, 435 F.2d 1219, 1222 (8th Cir. 1970) (same).
>
> Wilkinson v. United States, 677 F.2d 998, 1000 (4th Cir.) (affirming the dismissal of a claim arising from a collision with an automobile driven by a serviceman while on duty because claimant failed to seek administrative relief), cert. denied, 459 U.S. 906, 103 S.Ct. 209, 74 L.Ed.2d 167 (1982).
>
> Wollman v. Gross, 637 F.2d 544 (8th Cir. 1980) (affirming dismissal of a claim arising from a collision with an automobile driven by an employee of the Agricultural Stabilization and Conservation Service because the plaintiff's claim for administrative relief was untimely), cert. denied, 454 U.S. 893, 102 S.Ct. 389, 70 L.Ed.2d 207 (1981).

United States v. LePatourel, 571 F.2d 405, 410 (8th Cir. 1978) (reversing the district court's refusal to dismiss a claim arising from a collision with vehicle driven by a federal judge because claimant failed to seek administrative relief), modified to apply prospectively, 593 F.2d 827 (8th Cir. 1979) (en banc).

Therefore, those cases are not relevant herein because Houston did not bypass the procedure -- he complied with it. Houston did not attempt to bypass the system -- Houston complied with the system. The United States was given an opportunity to dispose of Mr. Houston's claim. However, it denied the claim. The purposes of the Federal Tort Claims Act were met. When the irrelevant cases are disregarded, Miller, Staple, McGowan, Kelley, Henderson (of the 10th Circuit), Robinson and Whistler become the majority -- if not exclusive -- rule. Houston falls squarely within that majority rule -- suit in state court is sufficient to

grant federal jurisdiction when the case is removed to federal court.

Congressional history may, as the court pointed out, mandate that a plaintiff in the ordinary Federal Tort Claims Act case file that administrative claim. The purpose of the administrative requirement is to "reduce unnecessary congestion in the courts" by permitting an administrative settlement of the claims against the United States.[3]

If this court were to delete from the above list of authorities all of the cases which had been dismissed because the plaintiff had failed to file a timely claim, no cases would remain which would be in the government's favor. Indeed, the remaining cases would be the plaintiff-

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[3] S.Rep. No. 1327, 89th Cong., 2d Sess., (1966), reprinted in 1966 U.S. Code Cong. & Ad. News 2515, 2518; H.R. Rep. No. 1532, 89th Cong., 2d Sess., p. 8 (1966).

favorable cases.

The citations of the Fifth Circuit to Jayson[4] and the Comment in the Emory Law Journal[5] also lack relevance as authority in the case at bar. This is because they, too, discuss situations and cases in which plaintiffs had failed to file administrative claims. They fail to discuss situations and cases in which plaintiffs had filed administrative claims.

When the real "majority" -- if not exclusive -- opinion regarding Federal Drivers Act cases is combined with the fact that the plaintiff did in fact file an administrative claim timely, the dis-

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[4] L. Jayson, Handling Federal Tort Claims, § 175.03[2] at 6-27, cited on App., p. A-19.

[5] Comment, Administrative Claims and the Substitution of the United States as Defendant Under the Federal Drivers Act: The Catch 22 of The Federal Tort Claims Act?, 29 Emory L.J. 755, 775 (1980), cited on App., p. A-4.

trict court was correct in finding that federal court had jurisdiction over Houston's claim.

Based on the foregoing, it is submitted that the authorities cited by the United States and relied upon by the court do not support the denial of this plaintiff's claim because he did, in fact, exhaust his administrative remedies. The remaining cases support the timeliness of the plaintiff's claim.

Thus, the state court suit in this Federal Drivers Act case interrupted the statute of limitations as to the United States and the district court had jurisdiction over the removed action.

II. A LAWSUIT WHICH IS PREMATURE BECAUSE IT WAS FILED BEFORE THE PLAINTIFF EXHAUSTED HIS ADMINISTRATIVE REMEDIES MAY BE CURED BY A SUPPLEMENTAL COMPLAINT. THE REFUSAL OF THE FIFTH CIRCUIT TO FOLLOW THAT RULE CONFLICTS WITH DECISIONS OF THIS COURT.

One of the major issues in this case

is whether a premature lawsuit may be cured by a supplemental pleading. In this case, the lawsuit, according to the Fifth Circuit, was premature because it was filed before the plaintiff had filed his administrative claim. The result of the court's holding is that if a lawsuit is premature, it is hopelessly premature because the prematurity may not be cured. The Fifth Circuit relied on Reynolds v. United States, 748 F.2d 291 (5th Cir. 1984) in support of its opinion. App., p. A-18. Reynolds and the opinion in the case at bar are in direct conflict with Mathews v. Diaz, 426 U.S. 67, 75, 96 S.Ct. 1883, 1889, 48 L.Ed.2d 478 (1976). Mathews held that if a lawsuit was premature because of a jurisdictional defect when it was filed, subsequent events could cure that prematurity when the allegations of the original suit were supplemented.

In Mathews, an alien challenged the constitutionality of a provision of the Social Security Act which related to aliens. The plaintiff had failed to file a required application with the Department of Health, Education and Welfare before he filed suit. The Secretary of the Department of Health, Education and Welfare raised a defense that the court lacked jurisdiction over the plaintiff's action because of the plaintiff's failure to exhaust his administrative remedies prior to his filing of suit. Similarly, in the case at bar, plaintiff's failure was his failure to exhaust administrative remedies before he filed suit. This Court stated as follows in holding that the jurisdictional prematurity could be cured:

> "We must therefore decide whether the District Court had jurisdiction over Espinosa's claim.
>
> "We have little difficulty with Espinosa's failure to file an appli-

cation with the Secretary until after he was joined in the action. Although 42 U.S.C. § 405(g) establishes filing of an application as a nonwaivable condition of jurisdiction, Mathews v. Eldridge, 424 U.S. 319, 328, 96 S.Ct. 893, 899, 47 L.Ed.2d 1829 (1976); Weinberger v. Salfi, 422 U.S., at 764, 95 S.Ct., at 2466, 45 L.Ed.2d, at 538, Espinosa satisfied this condition while the case was pending in the District Court. A supplemental complaint in the District Court would have eliminated this jurisdictional issue; since the record discloses, both by affidavit and stipulation, that the jurisdictional condition was satisfied, it is not too late, even now, to supplement the complaint to allege this fact. Under these circumstances, we treat the pleadings as properly supplemented by the Secretary's stipulation that Espinosa had filed an application." (Emphasis added.) (Footnotes omitted.) 426 U.S. at 74-75, 96 S.Ct. at 1889.

In fact, Mathews has been followed in a Federal Tort Claims Act case. In that case, the government filed a motion to dismiss and argued that the complaint was premature because the plaintiff had not exhausted his administrative remedies. Tuepker v. Farmers Home Administration,

538 F.Supp. 375,376 (W.D. Mo. 1982). The court held that the prematurity had been cured, and citing Mathews, stated as follows:

> "We consider plaintiff's 'second amended petition' which alleges final denial of his administrative claim as a supplemental complaint. A jurisdictional precondition requiring filing of an agency complaint prior to review in the courts can be satisfied by a supplemental complaint." (Emphasis added.) Id. at 376, fn.1.

Unfortunately, neither the plaintiff nor the government brought either Mathews or Tuepker to the attention of the court in Reynolds, where the court held that a premature FTCA suit was, in essence, hopelessly premature. The Fifth Circuit relied on Reynolds in making a distinction which it stated was "especially important" and in also stating that if Houston's case had been removed, "the judge would have had to dismiss the case for lack of jurisdiction." App., p. A-19. Under Mathews

and Tuepker, the court was simply wrong in its conclusion as to the irremedial effect of the prematurity.

A case cited by this Court as authority for its holding in Mathews is particularly instructive. That case, Security Insurance Company of New Haven, Conn. v. United States, 338 F.2d 444 (9th Cir. 1964) involved a Miller Act claim. The Miller Act in part required that a creditor had to submit a claim and wait ninety days after the last material was furnished before he could file a lawsuit. The act also set forth a one-year statute of limitations for filing suit. Id. at 445. Unfortunately for the plaintiff, the complaint was premature because it was filed less than 90 days after the last material was supplied. The plaintiff later supplemented his complaint to show that more than 90 days had passed by the time the

supplement was filed. However, that supplement was filed after the one-year statute of limitations had passed. Thus, the question was whether the plaintiff's claim was barred by the statute of limitations.

The defendant's argument in Security Insurance was similar to the one urged by the government in the case at bar. The court set forth the defendant's argument:

> "Appellant's argument, in substance, is this: When the complaint was filed the plaintiff had no claim for relief because the ninety-day period specified in subsection (a) supra had not expired. When the supplement to the complaint was filed, more than one year from the pertinent date had expired." Id. at 445-446.

The court of appeals responded in Security Insurance as follows:

> "Nothing but the most compelling authority, emanating from the Supreme Court of the United States itself, would induce us to stay on this legal merry-go-round." Id. at 446.

It then cited one of its prior opinions in which it had held that an amend-

ment adding later facts should be treated as a supplemental complaint rather than an amended complaint based upon "the remedial purpose of Rule 15." Id. at 448.

It then held that the supplemental complaint could relate back to the initial filing so as to prevent the one-year statute of limitations from barring the action. It also held that it was "not required to apply the doctrine of relation back so literally as to carry it to a time within the ninety-day period specified in subdivision (a), so as to prevent the maintenance of the action in the first place." Id. at 449. The court, as did this Court in Mathews, thus permitted the prematurity of the lawsuit to be cured even when that prematurity related to a jurisdictional prerequisite of exhausting administrative remedies.

The principle that a premature law-

suit may be cured has also been followed in the following cases:

1. A lawsuit for invasion of a copyright was filed before the plaintiff had recorded the assignments by which it had obtained its rights to the copyright. Although the suit was premature because the required governmental recording had not been accomplished, that prematurity was cured by an amendment reflecting that the assignment had been recorded after the lawsuit was filed. Meta-Film Associates, Inc. v. MCA, Inc., 586 F.Supp. 1346, 1350-1352 (C.D. Cal. 1984). See also Quincy Cablesystems, Inc. v. Sully's Bar, Inc., 650 F.Supp. 838, 850-851 (D. Mass. 1986).

2. A Miller Act suit was filed before the required ninety days had elapsed from the date on which the last material had been supplied by the plaintiff. The court of appeals held that a supplemental pleading curing the prematurity should be permitted. United States v. C. J. Electrical Contractors, Inc., 535 F.2d 1326, 1330 (1st Cir. 1976).

Federal Rule of Civil Procedure 15 has also been discussed by the doctrinal writers. For instance, Professor Moore

states as follows:

> "Occasionally, parties against whom an amendment is sought have invoked relation back to contend that a claim stated in a proposed amendment was premature; courts, however, have generally refused to apply Rule 15(c) 'involuntarily' in this manner to penalize the party seeking the amendment." (Emphasis added.) Moore, Federal Practice, 2d Ed., ¶ 15.15[5].

Wright and Miller also discuss Rule 15(d). They note that 15(d) was added to prevent a plaintiff from having "to go through the needless formality and expense of instituting a new action when events occurring after the original filing indicated he had a right to relief" because that would be "inconsistent with the philosophy of the federal rules." Wright & Miller, Federal Practice & Procedure, § 1505. They also note that, "a supplemental pleading has been used for such purposes as alleging that sufficient time has elapsed to cure a premature filing..." (Emphasis added.) Id.

Applying the principle of prematurity to the case at bar, although Houston's lawsuit was premature when it was filed, that prematurity was cured by the supplemental and amending petition which was filed on April 21, 1980. Based on Mathews and the other authorities cited above, if the suit had been filed in Federal court, the prematurity would have been cured.

As has been reflected in I, supra, the fact that the suit was filed in state court is no defense to the jurisdiction of federal court after the suit was removed. Similarly, because the administrative claim requirement was met, the fact that the suit was filed before and not after the denial of the claim is no defense to the merits of the claim.

III. IF THE OPINION REMAINS, PLAINTIFFS WILL BE REQUIRED TO FILE BOTH STATE COURT AND FEDERAL COURT SUITS IN ALL CASES INVOLVING FEDERAL DRIVERS. THIS IS BECAUSE A PLAINTIFF CAN NEVER "KNOW" WHEN THE FEDERAL TORT CLAIMS

ACT WILL APPLY BECAUSE THE PLAINTIFF CAN NEVER KNOW WHEN A GOVERNMENT EMPLOYEE WAS ACTUALLY ACTING WITHIN THE COURSE OF HIS EMPLOYMENT.

The Federal Drivers Act provides that when suits against federal drivers are filed in state court, those suits can be removed to federal court when the driver was acting within the scope of his employment at the time of the accident. In such cases, the United States is substituted for the driver and the action is deemed to be against the United States. A problem arises because there are times when the driver was driving a federal vehicle and was not within the scope of his employment at the time of the accident. In such a case, the United States would not be liable and if suit against the driver had not been filed in state court, then the statute of limitations as to the individual driver would not have been interrupted.

The Fifth Circuit, in its opinion, assumes that the plaintiff should have been certain that the driver of the marked Postal Service car was driving that car "in the course of his employment." App., p. A-14. Unfortunately, plaintiffs have relied upon similar assumptions only to have their cases dismissed because the government proved that the driver of the government vehicle was not in the course of his employment when he injured the plaintiffs.

Government-owned vehicles will almost always have some type of government identification. At the very least, virtually every government-owned automobile will have a federal license plate. That license plate at a bare minimum, according to the court's theory, should indicate to a plaintiff that his action against the driver would fall under the Federal Tort

Claims Act. Unfortunately, many plaintiffs have rested upon that assumption. They, however, have learned to their dismay that they had no case against the government because the government proved that the driver of the federal vehicle was not in the scope of his employment at the time of the accident.

The following is a list of cases in which a federal driver driving a federal vehicle was held not to be in the scope of his employment at the time of the accident:

1. An employee of the Small Business Administration was driving a government automobile. Tomack v. United States, 369 F.2d 350 (2d Cir. 1966).

2. A member of a geological and topographical survey was driving a United States Geological Survey truck. United States v. Lushbough, 200 F.2d 717 (8th Cir. 1952).

3. A war department employee was driving an Army Staff car. Long v. United States, 78 F.Supp. 35

(S.D. Cal. 1948).

4. An employee of the Atomic Energy Commission Security Service was driving a government vehicle. Sanchez v. United States, 177 F.2d 452 (10th Cir. 1949).

5. A VISTA worker was driving a government vehicle. Erwin v. United States, 445 F.2d 1035 (10th Cir. 1971), cert. denied, 404 U.S. 992, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971).

To make matters worse, the government may vacillate in its decision as to whether it will argue that a driver was within the scope of his employment. In addition, even if the government's position is that the driver was within the scope of his employment, that decision is not binding on the courts. Seiden v. United States, 537 F.2d 867, 870 (6th Cir. 1976). The government may also withdraw its admission at any time. 28 C.F.R. § 15.3(a). App., p. A-63.

Borrego v. United States, 622 F.Supp. 457 (D.Puerto Rico 1985), rev'd, 790 F.2d

5 (1st Cir. 1986) was one more in the line of cases in which the government claimed that the federal driver was not in the scope of employment at the time of the accident. In Borrego, the plaintiff filed suit against the United States after having exhausted the administrative claim process. Id., 622 F.Supp. at 458. The government argued that the employee was not acting within the scope of his employment -- even though the accident occurred at 11:45 a.m. when the employee-driver was operating a federal vehicle owned by the federal government. The government's position was upheld by the district court. It was only on appeal that the plaintiff was able to save his potential case against the United States. The court of appeals reversed the district court and held that the driver was within the scope of his employment when the accident

occurred.

It should be noted, however, that the ultimate reason that the court of appeals gave for reversing was:

> "A majority of the court believes it would be inequitable, under those circumstances, to force the employee to assume personal liability in a situation where the use of the government's car is only of incidental benefit to the employee." Id., 790 F.2d at 8.

Thus, it was apparently equity more than law which permitted the plaintiff's case to remain in court. If the government's position had been maintained, then, in all probability, the statute of limitations in the action against the driver in state court would have run and the driver would have had no remedy.

The government has suggested that an injured party should file two suits to be fully protected. Lawyers should not be forced to clog courthouses with protective suits in order to safeguard their clients

and themselves against a United States Attorney arguing that a government driver was not within the scope of employment when an accident occurred. If the Fifth Circuit's rule is to be followed, all plaintiffs will have to file two suits in every case against every federal driver in order to fully protect themselves. That, in turn, will clog the dockets of both state and federal courts with protective suits, which protective suits should not be required. It will also entail each plaintiff having to unnecessarily pay for the filing of two suits.

The purpose of the amendment to the Federal Tort Claims Act was "to reduce unnecessary congestion in the courts."[6] The requirement that two suits must be filed in every case will cause a result which is diametrically opposed to the

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[6] See n. 3, supra.

purpose of the amendment. Rather than reducing unnecessary congestion, the two-suit requirement will increase the very "unnecessary congestion in the courts" that the Federal Tort Claims Act is attempting to eliminate.

The rationale of Mathews v. Diaz, supra, pp. 22, et seq., supra, would permit a plaintiff to file only one suit to protect his rights against the driver and the United States. He would be protected whether or not the driver was in the scope of his employment. Thus, courts would not be burdened with protective lawsuits which plaintiffs were required to file because of the opinion of the Fifth Circuit in the case at bar.

Applying Mathews to cure the prematurity herein will thus result in judicial economy and comply with the intent of the Federal Tort Claims Act to "reduce conges-

tion in the courts" because then all cases involving federal drivers will not have to be filed in both state and federal courts.

Based upon the foregoing, and upon the Fifth Circuit's opinion, every plaintiff will always have to file two lawsuits in every automobile case in order to protect his rights. He will have to file a federal and a state suit. Congress certainly did not intend, when it passed the Federal Drivers Act, to require all plaintiffs to file two suits. It may have intended to require an administrative claim -- but Houston complied with that requirement. Although he did file a lawsuit prior to the denial of the claim, cases such as Miller, Staple, McGowan, Kelley, Henderson (of the 10th Circuit), Robinson, Whistler and Reynaud have held that the filing of that state suit was sufficient.

It is submitted that this Court should accept certiorari, adopt the real majority -- if not exclusive -- rule and hold that federal court has jurisdiction over a removed state court suit at least when (1) that suit was timely filed within the federal two-year period and (2) where an administrative claim was timely filed and the administrative claim procedure was not bypassed.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

ADOLPH J. LEVY
518 South Rampart Street
New Orleans, Louisiana 70113
Telephone: (504) 586-9707

Attorney for Petitioner,
Alton J. Houston